No. 15-674

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors who teach, write, and research administrative law. They have extensively studied the effect of administrative law on public administration and have a strong interest in identifying the proper scope of the Administrative Procedure Act's notice-and-comment requirement under 5 U.S.C. § 553.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief. Petitioners filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs; the written consent of respondents to the filing of this brief is being submitted with this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has expressly authorized the Secretary of the Department of Homeland Security ("DHS") to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority," 8 U.S.C. § 1103(a)(3). For years, the Secretary has acted pursuant to this statutory authority to forbear from removing particular undocumented immigrants for discretionary reasons. In November 2014, DHS Secretary Jeh Johnson issued a memorandum extending that policy of forbearance to certain "removable aliens" residing in the United States whose children are American citizens or lawful permanent residents. *See* Memorandum from Jeh Johnson, Sec'y, DHS, to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al., at 3-4 (Nov. 20, 2014) ("DAPA Memo"), *available at* https://www.

dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

The DAPA Memo represents the formalization of the DHS's policy with respect to the agency's exercise of its statutory enforcement discretion. Rather than creating substantive legal rights or imposing substantive legal obligations, DAPA simply "'"advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power."'" *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947) ("AG Manual"))). As such, the DAPA Memo falls within the Administrative Procedure Act's ("APA") definition of a "general statement of policy," which is exempt from notice-and-comment requirements. 5 U.S.C. § 553(b)(A) (allowing agencies to issue "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" without engaging in notice and comment).

The Fifth Circuit adopted an erroneous legal standard in reaching the conclusion that the DAPA Memo was not a general statement of policy.[3] *First*, the court mistakenly held that the DAPA Memo was subject to notice and comment because it did not "genuinely

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[3] While *amici* may hold varying views on whether the agency would have been well served, as a matter of public policy, to undertake notice and comment, they all agree that the APA did not *require* DHS to engage in notice and comment before promulgating the DAPA Memo, because it falls under the APA's policy statement exception. *Amici* do not address in this brief whether the DAPA Memo also falls under the APA's benefits exception, *see* 5 U.S.C. § 553(a)(2), or the APA's exception for procedural rules, *see id.* § 553(b)(A).

leave the agency *and its employees* free to exercise discretion." *Texas v. United States*, 809 F.3d 134, 176 (5th Cir. 2015) (emphasis added). Regardless of whether the underlying factual premise of this assertion is accurate, the fact that an agency pronouncement binds lower-level agency officials does not mean it is a legislative rule rather than a policy statement for APA purposes. Indeed, a central purpose of general policy statements is to permit the agency head to direct the implementation of agency policy by lower-level officials.

As *amici* and other administrative law scholars have explained, it is critical for agency heads to be able to bind lower-level agency employees to ensure that the agency's policies are reliably carried out. *See, e.g.*, Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 Yale L.J. 1836 (2015); 3 Richard J. Pierce, Jr., *Administrative Law Treatise* § 17.3 (5th ed. 2010) ("Pierce"); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803 (2001). Requiring notice and comment every time an agency head promulgates binding internal guidance would fundamentally impair agency heads' ability to direct the agencies they are statutorily charged with overseeing. Discretion at the level of the agency head, not discretion by lower-level staff, is therefore the essential factor.

Second, the Fifth Circuit erred to the extent it stated that a policy statement's "substantial impact" on third parties is a basis to require notice and comment. *See Texas*, 809 F.3d at 176. Creating legal rights and obligations, not practical effects, is the touchstone for notice and comment. *See* 3 Pierce § 17.3, at 1572 (notice and comment required if a rule has "a legal

binding effect on members of the public"). There is no textual support in the APA for a "substantial impact" test. Such a test would undercut the explicit exemptions in the APA. *See* 5 U.S.C. § 553(b)(A). The APA is clear that policy statements and interpretive rules may affect the public, and even be relied upon by the agency, so long as they were appropriately published or the public had actual notice, as happened here. *See id.* § 552(a)(2). Moreover, such a substantial impact test is wholly unworkable in practice.

The fact that individuals who qualify for deferred action under the DAPA Memo may then request work authorization does not transform the DAPA Memo into a substantive rule. Such work authorization is the result of a rule adopted through notice and comment in 1987 allowing individuals with deferred action to request work authorization. *See* Final Rule, Control of Employment of Aliens, 52 Fed. Reg. 16,216 (May 1, 1987).

This Court has repeatedly and consistently admonished lower courts not to impose additional procedural requirements on agencies beyond those mandated by the APA, including just last Term in *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015). The Fifth Circuit's decision should be reversed because it ignores the Court's instructions and improperly expands the APA's notice-and-comment requirement.

ARGUMENT

I. THE COURT BELOW APPLIED AN ERRONEOUS STANDARD IN DETERMINING WHETHER THE DAPA MEMO CONSTITUTES A GENERAL STATEMENT OF POLICY

A. General Policy Statements Are Pronouncements that Advise the Public Prospectively About the Way an Agency Will Exercise Discretionary Authority

It is well-established that regulations that create legally enforceable rights or obligations for regulated parties have the force and effect of law, and therefore are "legislative" or "substantive" rules that must go through notice and comment. *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *Morton v. Ruiz*, 415 U.S. 199, 232, 236 (1974); *see also* 3 Pierce § 17.3, at 1572. Distinguishing between legislative rules and those rules the APA expressly exempts from notice and comment has long been recognized as "enshrouded in a considerable smog." *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); *see General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc); *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (describing the inquiry as "quite difficult and confused").[4] This case presents an opportunity

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[4] Administrative law scholars have long struggled to try to make sense of the distinction. Leading recent works include David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276 (2010); William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321 (2001); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. Chi. L. Rev. 1705 (2007); John F. Manning, *Nonlegislative Rules*, 72

for the Court to provide much needed clarity and predictability on that question. *See generally* Manning, 72 Geo. Wash. L. Rev. at 893 ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'").

Although the APA does not expressly define a "general statement[] of policy." 5 U.S.C. § 553(b)(A), the AG Manual – a source to which the Court refers for insight on the APA's meaning, *see, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978) – describes policy statements as a means by which an agency may "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." AG Manual at 30 n.3.

That definition is appropriate. The APA's drafters were concerned with ensuring that the public was *informed* of agency policies. *See* Strauss, 53 Admin. L. Rev. at 804-12. They deemed of central importance section 3(a) of the APA, 5 U.S.C. § 552(a), which requires agencies to publish statements of general policy, along with substantive rules, interpretations, organization, and procedure, in the Federal Register. *See* S. Rep. No. 79-752, at 198 (1945). The rules covered by the express exemptions from notice and comment in § 553(b)(A) were viewed as part of this informing function and adopted precisely "to encourage the making of such rules" in the first place. *See* S. Comm. on the Judiciary, Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at 18 (2d Sess. 1946); Strauss, 53 Admin. L. Rev. at 804-12.

Geo. Wash. L. Rev. 893 (2004); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 Cornell L. Rev. 397 (2007).

The definition is also consistent with recent D.C. Circuit case law, which states that notice and comment is required only when the agency's issuance itself imposes legally binding obligations. As Judge Kavanaugh stated in *National Mining Association v. McCarthy*, "[a]n agency action that merely explains how the agency will enforce a statute or regulation – in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule – is a general statement of policy." 758 F.3d at 252; *see also Catawba County v. EPA*, 571 F.3d 20, 33-34 (D.C. Cir. 2009) (per curiam) (deeming EPA memorandum a policy statement because it "does not create or modify legally binding rights or obligations") (citing *General Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002)).

B. The Fifth Circuit Erred in Requiring Policy Statements To Leave Lower-Level Agency Officials "Free To Exercise Discretion"

In affirming the preliminary injunction, the Fifth Circuit held that the DAPA Memo is a substantive rule because "the states have established a substantial likelihood that DAPA would not genuinely leave the agency *and its employees* free to exercise discretion." *Texas*, 809 F.3d at 176, 178 (emphasis added). That reasoning was inappropriate because promulgating binding guidance for lower-level agency officials is precisely what general policy statements are properly designed to do.[5]

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[5] Other circuits have rejected the Fifth Circuit's proposition that a guidance document becomes legislative if it binds agency staff. *See, e.g., Erringer v. Thompson*, 371 F.3d 625, 631 (9th Cir. 2004) ("Although the [agency manual's] criteria do bind the Medicare contractors, our query is whether the rule has a binding effect 'on tribunals *outside* the agency.'"); *Splane v. West*, 216

1. The Fifth Circuit's Holding Is at Odds with Constitutionally Grounded Hierarchical Agency Structure as Reflected in the APA's Text

Federal statutes typically vest discretion to determine agency policy in the agency head – here, the Secretary of DHS. *See, e.g.*, 8 U.S.C. § 1103(a)(3) ("[the Secretary of Homeland Security] shall establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority"); 6 U.S.C. § 202; *see also United States v. Mead Corp.*, 533 U.S. 218, 236 (2001) (noting "the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it"). The role of agency staff, by contrast, is to carry out the policy decisions made by the Secretary. *See, e.g.*, 8 U.S.C. § 1103(a)(2) ("[The Secretary of Homeland Security] shall have control, direction, and supervision of all employees . . . of the Service.").

That structure is set out in the Constitution itself. Article II provides express textual recognition of a duty to supervise that extends beyond the President and "represents a broader structural principle running throughout Article II's treatment of the executive branch." Metzger, 124 Yale L.J. at 1875. The Take Care Clause, which specifies that the President "shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, contemplates that the "actual execution of the laws will be done by others" under the President's oversight and that such oversight is

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F.3d 1058, 1064 (Fed. Cir. 2000) ("[T]he [Supreme] Court's reference to a regulation having the 'force and effect of law' is to the binding effect of that regulation on tribunals *outside* the agency, not on the agency itself.").

mandatory. Metzger, 124 Yale L.J. at 1875-77. The Constitution thus lays the foundation for a "hierarchical structure for federal administration, under which lower government officials act subject to higher-level superintendence." *Id.* at 1879.[6]

2. Requiring Notice and Comment for Internally Binding Agency Pronouncements Undermines Sound Agency Practice

A policy statement's ability to bind agency staff without notice-and-comment rulemaking is crucial to facilitating the agency secretary's constitutionally grounded duty to supervise and effectively delegate responsibilities to lower-level officials. This role for policy statements was identified by the Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 77-8 (1st Sess. 1941) ("AG's Committee Final Report"), an important document in the development of the APA. That report urged agency heads to make greater use of these kinds of issuances, "stating for the guidance of agency officials those policies which have been crystallized, and which the responsible officers need only apply to the particular case at hand." AG's Committee Final Report at 23; *see also id.* at 26 (noting agencies' reliance on general policies and interpretations, and urging recognition "of the authority and duty of agencies to issue such information").

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[6] This structure also is evident in the Appointments Clause case law, which defines "inferior Officers" as "'officers whose work is directed and supervised at some level' by other officers appointed by the President with the Senate's consent." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

The importance of internally binding guidance for agency accountability is equally vital today. For instance, a 2007 Bulletin issued by the Office of Management and Budget entitled "Agency Good Guidance Practices" explains that, "while a guidance document cannot legally bind, agencies can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees without undertaking pre-adoption notice and comment rulemaking." Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007) ("OMB Bulletin"); *see id.* at 3440 ("Agency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence.").[7]

The Administrative Conference of the United States ("ACUS"), a congressionally created body intended to improve agency practice,[8] has similarly emphasized the importance of agencies providing authoritative guidance for agency staff. In its Recommendation No. 92-2 on policy statements, ACUS stated that agencies may make "a policy statement which is authoritative for staff officials in the interest of administrative

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[7] The OMB Bulletin clarified that mandatory language such as "shall" and "must" is permissible if the language is "addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties." OMB Bulletin, 72 Fed. Reg. at 3440.

[8] ACUS is empowered by statute to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate." 5 U.S.C. § 594(1).

uniformity or policy coherence," adding that "agencies are encouraged to provide guidance to staff . . . as a means to regularize employee action that directly affects the public." Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 57 Fed. Reg. 30,101, 30,103, 30,104 (July 8, 1992). So, too, the Model State Administrative Procedure Act, drawing on both the ACUS Recommendation and the OMB Bulletin, reiterated that "[a] guidance document may contain binding instructions to agency staff members." Revised Model State Administrative Procedure Act § 311(c), at 43 (2010), *available at* http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf; *see also* Ronald M. Levin, *Rulemaking Under the 2010 Model State Administrative Procedure Act*, 20 Widener L.J. 855 (2011).[9]

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[9] Early administrative practice also reveals an emphasis on the central role of the "internal law of administration," under which "higher-level officials instruct subordinates and through which they can call them to account for their actions." JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 7 (2012). And, as Professor Mashaw has extensively documented, the prime mechanism for such high-level oversight was the equivalent of modern-day policy statements and guidance: internal circulars and memos laying out the agency head's views on policy matters and instructing lower-level officials on how to proceed. *Id.* at 140. For instance, "the consistency, propriety, and energy of administrative implementation was made accountable primarily to high-ranking officials in the Treasury and the General Land Office." *Id.* "These were the sources of instruction, interpretation, audit, and oversight that counted in the day-to-day activities of administrative officials." *Id.*

3. Internally Binding Agency Guidance Serves the Public's Interests in Predictable and Transparent Agency Action

The power of agencies to order their internal operations by binding lower-level staff not only is critical to agency practice, but also serves the public's interests in the predictability and reliability of agency action. *See generally* Strauss, 53 Admin. L. Rev. at 808; Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463 (1992); 3 Pierce § 17.3, at 1571-72. And strong internal supervision within the executive branch is essential "to ensure that policies and priorities specified by elected leaders are actually carried out on the ground." Metzger, 124 Yale L.J. at 1892-93; *see also Free Enter. Fund*, 561 U.S. at 497-99 (emphasizing the importance of a "clear and effective chain of command" to political accountability, as the public looks to the "President to guide the assistants or deputies . . . subject to his superintendence") (internal quotation marks omitted; alteration in original). Predictable, trustworthy administration of agency policy in turn benefits the public. *See* 3 Pierce § 17.3, at 1572 ("Agency employees routinely apply [guidance] to limit their own discretion, and the public routinely relies on [them] as a basis for predicting agency actions.").

While notice-and-comment rulemaking promotes transparency and public participation, it also takes resources and time. Completion of the notice-and-comment rulemaking process already takes, on average, more than a year. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471, 513 (2011) (estimating that the average notice-and-comment rulemaking process took

462.79 days, using data on completed actions from the 1983-2010 Unified Agendas). "Agencies rarely amend legislative rules in important ways once they are in effect because a major amendment typically involves cost and delay equal to that required to promulgate a major rule." 3 Pierce § 17.3, at 1574. And the time needed to complete the notice-and-comment process would only grow longer if it were mandated for all internally binding rules. Indeed, such a requirement would significantly expand the amount of notice-and-comment rulemaking agencies must undertake, given that agencies issue substantially more guidance than notice-and-comment rules. *See* Strauss, 41 Duke L.J. at 1469 (providing case studies of several agencies showing that agencies issue far more guidance than legislative rules); Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 785-86 (2010) (noting that guidance outnumbers legislative rules).

As these data on usage suggest, policy statements, like other forms of guidance, play a critical role in regulatory programs. *See* Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue*, 25 Yale J. on Reg. 103, 108 (2008) (noting that guidance documents are "a key component of regulatory programs"); U.S. Gov't Accountability Office, Statement of Michelle A. Sager, *Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Practices* 1 (Sept. 23, 2015) ("Regulatory guidance is an important tool that agencies use to communicate timely information about the implementation of regulatory and grant programs to regulated parties, grantees, and the general public."), *available at* http://www.gao.

gov/assets/680/672687.pdf. In fact, regulated industries and States seek out and benefit from agency instruction in the form of guidance. *See* Nicholas Bagley & Helen Levy, *Essential Health Benefits and the Affordable Care Act: Law and Process*, 39 J. Health Pol. Pol'y & L. 441, 442-43 (2014) (observing that guidance is the primary way agencies have delivered instructions to state officials implementing the Affordable Care Act); Jeff Overley, *Pressure Builds on FDA To Overhaul Guidance Process*, Law360 (Sept. 29, 2014) (noting that the Food and Drug Administration is open to demands from the public to implement "a faster and more responsive guidance process").

Treating statements that bind lower-level officials as substantive rules requiring notice and comment, as the Fifth Circuit does here, would undermine the APA's core objective of ensuring transparency in agency policy. Impeding agencies from issuing policy guidance would leave agency policy subject to the unpredictable and non-transparent discretion of lower-level officials. *See* 3 Pierce § 17.3, at 1575 (absent policy guidance, "[t]ens of thousands of low level bureaucrats w[ould] have broad discretionary powers, and the affected members of the public w[ould] have no means of predicting the many ways in which agency employees will exercise those discretionary powers"); *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for 'interpretive rule' so narrowly as to drive agencies into ad hocery – an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties.") (Williams, J.).

Such a position would also drive agency policymaking out of public view. Compelled by the need to bind lower-level officials, agencies would have perverse incentives to "continue to limit administrative discretion, but in ways that are hidden from public (and judicial) view." 3 Pierce § 17.3, at 1575. They could confine all staff instructions to informal, internal documents or oral statements, transforming policymaking into "an underground operation in which only a few favored individuals and interest groups participate." *Id.*; *see* Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43, 58 (1992) (explaining that in California, where agencies are required by statute to use notice and comment to promulgate all non-legislative rules, many agencies have stopped adopting rules and have left unrevised all preexisting "rules, manuals, bulletins, and the like even when these are outdated"); Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation:* CNI v. Young *and the Aflatoxin Dance*, 44 Admin. L. Rev. 131 (1992). The effect would be at odds with the APA's objective to increase public information, predictability, and supervision – the very goals § 553's policy statement exemption sought to achieve.

The supervisor approval and detailed implementation instructions that the Fifth Circuit cites as evidence of the DAPA Memo illegitimately binding internal staff, *see Texas*, 809 F.3d at 174-75, are precisely the types of oversight mechanisms that agencies must provide in order to ensure consistency and managerial control in mass administrative adjudication contexts. *See generally* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983). Put simply, the APA does not require notice and comment for guidance that binds lower-level agency officials, and courts should

not read it as such. *See* 3 Pierce § 17.3, at 1576 ("With luck, the Supreme Court will have occasion to reject th[is] doctrine unequivocally before it begins to have [a] devastating effect.").

C. Policy Statements Are Not Subject to Notice and Comment Simply Because They May Have a Substantial Practical Impact on Third Parties

1. A Substantial-Impact Test Is Contrary to § 552(a)(2) and the Exemptions Carved Out in § 553(b)(A)

The court below also erred in suggesting that an agency pronouncement must go through notice and comment if it might have a substantial practical impact on third parties outside of the agency. *Texas*, 809 F.3d at 176. To begin with, the panel itself acknowledged that the "substantial impact" test is used by the Fifth Circuit to distinguish between a *procedural* rule and a substantive rule, as opposed to between a *policy statement* and a substantive rule. *See id.* ("[T]he substantial impact test is the primary means by which [we] look beyond the label '*procedural*' to determine whether a rule is of the type Congress thought appropriate for public participation.") (internal quotation marks omitted; emphasis added; alterations in original). In fact, other courts have expressly declined to apply this substantial-impact test to policy statements. *See, e.g.*, *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1016 (9th Cir. 1987) (rejecting substantial-impact test during review of an earlier Immigration and Naturalization Service policy statement on deferred action). Even under the panel's own analysis, therefore, it appears that a policy statement remains exempt from notice and comment even if it has substantial practical effects on third parties.

There is also no basis for adopting a "substantial impact" test for imposing notice-and-comment requirements. Such a test finds no grounding in the APA's text. Indeed, such a test is inconsistent with the APA's express exemption of certain types of agency pronouncements from notice and comment even though they certainly can have substantial practical effects. *See* 5 U.S.C. § 553(b)(A). Take, for example, "interpretative rules."[10] The AG Manual defines "interpretative rules" as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." AG Manual at 30 n.3; *see Lincoln v. Vigil*, 508 U.S. 182, 197 (1993). An agency's construction of statutes and rules that it will then administer frequently will have a substantial impact on regulated entities, even in cases where it has "no binding effect on members of the public or on courts." 1 Pierce § 6.3, at 419.

The same goes for policy statements, which often have non-binding, substantial effects on the public. A substantial-impact test would improperly override the APA's express exemption for policy statements by creating an exception to this exemption out of thin air. *See KasparWire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001); *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982) ("Simply because agency action has substantial impact does not mean it is subject to notice and comment if it is otherwise expressly exempt under the APA."). Moreover, it is directly contrary to the APA's explicit provision, in § 552(a)(2), that a policy statement "that affects a member of the public may be relied on, used, or cited as precedent" by an agency against a party so long

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[10] "Interpretative" rules are commonly called "interpretive" rules, and this brief uses those terms interchangeably.

as it was published or there was actual notice, as occurred here.[11]

Lastly, a substantial-impact test would be unworkable in practice, creating uncertainty for agencies and effectively eliminating the APA's policy statement exception. The determination of how much impact a policy statement can have before notice and comment is required varies by context and court. Unsure of whether a court will deem a policy statement's impact "substantial," agencies will no doubt err on the side of using notice and comment. As this Court stated in an analogous context, the possibility of such judicial "Monday morning quarterbacking" on the agency's procedural choices "not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings." *Vermont Yankee Nuclear Power*, 435 U.S. at 547.

2. The DAPA Memo's Potential Impact on a Large Number of Individuals' Ability To Request Work Authorization Does Not Trigger Notice-and-Comment Obligations

Under the Immigration Reform and Control Act of 1986 ("IRCA"), the Immigration and Naturalization Service (DHS's predecessor) used notice-and-comment rulemaking, receiving thousands of comments in the

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[11] The full text of the last sentence of section 552(a)(2) provides: "A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof." 5 U.S.C. § 552(a)(2).

process, before reaffirming its pre-IRCA regulation providing that deferred-action recipients, along with other categories of aliens, are eligible to apply for work authorization. *See* 8 C.F.R. § 274a.12(c)(14); 52 Fed. Reg. at 16,217 (noting "broad spectrum" of participation); *see also* Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092, 46,092 (Dec. 4, 1987) (noting "wide spectrum" of participation in prior rulemaking). Accordingly, if and when many individuals receive deferred action pursuant to the DAPA Memo, they will, in turn, be able to apply for work authorization. If they receive such authorization, then employers may lawfully hire them, *see* 8 U.S.C. § 1324a(a)(1)(a), (h)(3), just as they have lawfully hired countless other aliens who have received such authorization over the past 30 years.

The fact that individuals who have been granted deferred action under the DAPA Memo may then request work authorization does not transform the DAPA Memo into a substantive rule. There is no basis in the APA for taking into account the incidental, practical impact of a rule in determining whether notice and comment is required. *See supra* pp. 17-19; *Cabais*, 690 F.2d at 237 n.3 (noting that "[t]he words 'substantial impact' do not appear in the APA"). Moreover, the eligibility for work authorization for deferred-action aliens as for many others is independent of the DAPA Memo and instead results from the IRCA and from the 1987 rule, which was adopted through notice and comment.

D. The Fifth Circuit's Approach Illegitimately Imposes Procedural Burdens on Agencies Beyond Those Set Forth in the APA

This Court has repeatedly rejected efforts by lower courts to augment the procedures required by the

APA. As the Court made clear in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." 435 U.S. at 524. "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Id.*

The Court affirmed this principle just last Term in *Perez v. Mortgage Bankers Association*. There, the Court overruled the D.C. Circuit's requirement that agencies must go through notice and comment prior to changing an interpretive rule. According to the Court, "the text of the APA makes plain [that] [i]nterpretive rules do not require notice and comment," and, therefore, an agency's amended interpretation of an interpretive rule does not either. 135 S. Ct. at 1208-09 (internal quotation marks omitted).

This Court specifically refused to impose additional procedural requirements on agencies in order to safeguard the interests of regulated parties, explaining that Congress has decided "to adopt standards that permit agencies to promulgate freely [interpretive] rules – whether or not they are consistent with earlier interpretations" – and that imposing the obligation to go through notice and comment to change a regulatory interpretation "is the responsibility of Congress or the administrative agencies, not the courts." *Id.* at 1207.

This assiduous insistence on not imposing procedural requirements beyond those set forth in the APA does not mean that, when an agency issues guidance outside of notice-and-comment rulemaking, its action goes unchecked. First, as the Court in *Perez* noted,

even when an agency does not proceed through notice and comment, "[t]he APA contains a variety of constraints on agency decisionmaking – the arbitrary and capricious standard being among the most notable." *Id.* at 1209.[12]

Second, the Court has made clear that an agency's choice to issue a policy statement or interpretive rule as opposed to a legislative rule issued through notice-and-comment rulemaking has other consequences for judicial review. In particular, the agency's statutory interpretations in the policy statement may not qualify for deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), depending on the circumstances, whereas those same positions in a legislative rule would presumptively warrant consideration under *Chevron*. *See Mead*, 533 U.S. at 229-30 (holding that rulemaking and its exercise are very good indicators for *Chevron* deference); *cf. Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (absence of notice-and-comment rulemaking does not automatically deprive the interpretation of judicial deference under *Chevron*). To the extent agencies wish to benefit from *Chevron* deference as to their statutory interpretation positions, this doctrine gives agencies an incentive to implement their statutes through legislative rules that have the public participation benefits of notice and comment. In short, administrative law polices agency policy statements

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[12] The Court also noted that "Congress is aware that agencies sometimes alter their views in ways that upset settled reliance interests" and addresses this concern by "sometimes includ[ing] in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations." 135 S. Ct. at 1209.

through standards of review that are clearly articulated in advance, not by imposing on an agency procedural requirements beyond those the agency or others could find in the APA.

II. THE DAPA MEMO IS A GENERAL STATEMENT OF POLICY

A. The DAPA Memo Is a Proper Exercise of the Secretary's Discretionary Power To Establish National Immigration Enforcement Policies and Priorities

The DAPA Memo embodies the Secretary's prospective decision, in the exercise of his congressionally delegated discretion, not to use DHS's limited resources to remove certain applicants from the United States. *See* DAPA Memo at 3 (recognizing that law-abiding parents of United States citizens or lawful permanent residents are "extremely unlikely to be deported given th[e] [DHS's] limited enforcement resources"). The DAPA Memo thus is a quintessential general policy statement because it announces the Secretary's prospective implementation, within his own agency, of his discretionary decision on "national immigration enforcement policies and priorities." 6 U.S.C. § 202(5).[13]

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[13] *Amici* also note that, contrary to the States' contention, the DAPA Memo grants significant discretion to internal agency staff. It explicitly gives agency officials discretion over enforcement decisions, referencing nine times the "case-by-case" determinations that U.S. Citizenship and Immigration Services agents must make in deciding whether to grant deferred action to applicants. DAPA Memo at 4-5. It also includes criteria that the agents are to use in exercising their discretionary judgment, such as considering whether an applicant "present[s] no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." *Id.*

Furthermore, the DAPA Memo does not create any legal rights or obligations for private parties. It expressly states: "This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority." DAPA Memo at 5.

The Secretary retains the discretion to change the agency's policy at any time, and no member of the public would have a legal basis to enforce the DAPA Memo if the agency were to modify its discretionary allocation of internal immigration enforcement resources. *Cf. Lincoln*, 508 U.S. at 197 ("Whatever else may be considered a 'general statemen[t] of policy,' the term surely includes an announcement like the one before us, that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation.") (alteration in original).

B. The Fifth Circuit's Reliance on President Obama's Press Release Was Improper

The Fifth Circuit inappropriately gave weight to President Obama's public statement that he "took action to change the law" in reference to DAPA in concluding that the DAPA Memo modified substantive rights. *See* Press Release, The White House, Office of the Press Secretary, Remarks by the President on Immigration – Chicago, IL (Nov. 25, 2014) ("Nov. 25, 2014 Press Release"), *available at* https://www.whitehouse.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il; *Texas*, 809 F.3d at 185. As an initial matter, the President was not

addressing whether the DAPA Memo was binding law subject to notice and comment, but merely using the term "law" in an informal sense. His press release stated: "[T]he way the change in the law works is that we're reprioritizing how we enforce our immigration laws generally. So not everybody qualifies for being able to sign up and register, but the change in priorities applies to everybody." Nov. 25, 2014 Press Release. The "change in the law" to which the President was referring was the alteration of removal priorities within the agency. At no point did the President suggest that the DAPA Memo was legally binding on the public. In fact, he specifically acknowledged that "[t]his isn't amnesty, or legalization, or even a pathway to citizenship – because that's not something I can do." *Id.*

Nor does the President's statement have the power to alter the legal status of the DAPA Memo under the APA, because Congress granted the Secretary, not the President, authority over national immigration enforcement priorities. *See supra* pp. 23-24 (discussing 6 U.S.C. § 202(5)). The President's power – and constitutional duty – is limited in this circumstance to *supervising* the DHS Secretary's exercise of that statutorily delegated authority. *See* Metzger, 124 Yale L.J. at 1929; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 605-08 (1984); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 Colum. L. Rev. 263, 322 (2006) (advocating "a conception of the agency official's role that emphasizes the official's independent duty under the law, as opposed to its acting in the stead of the President"). The President's characterization of the Secretary's DAPA Memo thus

is not authoritative and cannot be used to impose notice-and-comment requirements under the APA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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